




**National Rural Electric  
Cooperative Association**

A Touchstone Energy® Cooperative 

February 19, 2010

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: National Rural Electric Cooperative Association ("NRECA") and American Public Power Association ("APPA") Notice of Ex Parte Presentation, GN Docket Nos. 09-47, 09-51, 09-137 and WC Docket No. 07-245.

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, this ex parte notice is filed on behalf of NRECA and APPA. On February 19, 2010, Corry Marshall, APPA Government Affairs Representative, David Predmore, NRECA Corporate Counsel, Tracey Steiner, NRECA Senior Corporate Counsel, Laura Marshall Schepis, NRECA Government Relations Deputy Director and Counsel and Gloria Tristani, Spiegel & McDiarmid LLP, outside counsel to NRECA, met with the following individuals:

Ian Dillner, Deputy Chief, Competition Policy Division  
Thomas Koutsky, Senior Advisor, National Broadband Task Force  
Albert Lewis, Chief, Pricing Policy Division  
Marvin Sacks, Attorney-Advisor, Wireline Competition Bureau  
Nick Sinai, Energy and Environment Director, National Broadband Task Force

During the meeting, participants discussed barriers to broadband deployment in sparsely populated areas and the public policy rationale for maintaining the cooperative and municipal utility exemption from the FCC's pole attachment jurisdiction. The parties discussed information provided in the attached handouts and comments previously filed in the above referenced proceedings.

A copy of this letter and the handouts presented during the meeting are being filed via ECFS with your office. Please do not hesitate to contact me if you have any questions.

Sincerely,



David Predmore

cc: Ian Dillner, Thomas Koutsky, Albert Lewis, Marvin Sacks, Nick Sinai  
Attachments

## BASIC FACTS ABOUT ELECTRIC COOPERATIVES & POLES

### ***Electric cooperatives cover a vast territory with few consumers.***

- 864 electric distribution cooperatives
- Serve 42 million consumers in 47 states
- Median number of consumers per cooperative is 12,500
- Own and operate 2.5 million miles of distribution line and roughly **42 million poles, of which about 25% have some type of communications attachment**<sup>1</sup>
- Average \$4,472 in distribution plant costs per consumer<sup>2</sup>

### ***Cooperative attachment rates are designed to recover actual costs associated with providing attachment space on poles.***

- The majority of cooperatives are exempt from federal income tax, which requires “operation at cost” (no profits) and “equitable allocation” (no cross-subsidization).<sup>3</sup>
- The cost of poles is rising. The average cost of a bare 30 or 35 foot wood pole (not including supports, labor, shipping, etc.) costs in excess of \$200. Annual costs associated with maintaining a pole exceed \$100.<sup>4</sup>
- Taller poles are needed to accommodate attachments.
- In a 2003 study, NRECA found the average fee that cooperatives charged was \$10, which remains in line with more recent analyses done at the state level.<sup>5</sup>
- In many instances, cooperatives are not even recovering all their costs.<sup>6</sup>

<sup>1</sup> 2003 NRECA data.

<sup>2</sup> NRECA calculated median average for poles, line, towers, meters and transformers.

<sup>3</sup> See NRECA comments submitted in response to FCC Notice of Proposed Rulemaking regarding the Rules and Policies Governing Pole Attachments, WC Docket No. 07-245 at 6 (Filed April 22, 2009).

<sup>4</sup> See, e.g., *Analysis of Pole Attachment Rate Issues in Tennessee* (Mar. 2007) (finding the average a weighted mean pole cost of \$ 308.16 per pole and an weighted annual mean cost of \$102.22 per pole in 2005/2006 and cooperative CATV pole attachment average rate of \$11.63, with rising rates tracking rising pole costs), available at: [http://www.tennessee.gov/tacir/PDF\\_FILES/Other\\_Issues/pole%20attachment%20rate%20issues.pdf](http://www.tennessee.gov/tacir/PDF_FILES/Other_Issues/pole%20attachment%20rate%20issues.pdf).

<sup>5</sup> Id.

<sup>6</sup> According to NRECA research conducted in 2003, 51% of co-ops were not being reimbursed for costs associated with inventorying and inspecting attachments, 39% were not being reimbursed for costs to move attachments to a relocated or replaced pole, and 28% were not being reimbursed for costs to remove unsafe, unauthorized or abandoned attachments.

## LEGISLATIVE HISTORY OF THE POLE ATTACHMENT STATUTE & THE EXEMPTION FOR MUNICIPALS, COOPERATIVES & RAILROADS

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On February 21, 1978, Congress enacted the Communications Act Amendments of 1978 amending the 1934 Act to “provide for the regulation of utility pole attachments.” Senate Bill 1547 was the predecessor to the 1978 Act.

### ***Congress favored State and local pole attachment regulation, and therefore limited the FCC’s authority over pole attachments.***

“This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems. **Even in this instance S. 1547 ... does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment agreements,**” but involvement “only” when a utility or cable television system “invokes the powers conferred by S. 1547 ... to hear and resolve complaints.”<sup>1</sup>

“The basic design of S. 1547, as reported, is to empower the [FCC] to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a state or more local regulatory forum is unavailable for resolution of disputes.... S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner.”<sup>2</sup>

The Committee considers the matter of CATV pole attachments to be essentially local in nature, and that **the various state and local regulatory bodies** which regulate other practices of telephone and electric utilities **are better equipped to regulate CATV pole attachments.... It is only because such state or local regulation currently does not widely exist that federal supplemental regulation is justified.**<sup>3</sup>

### ***Congress exempted cooperatives and municipals from Federal pole attachment regulation for valid policy reasons.***

“Because the **pole rates charged by municipally owned and cooperative utilities are already subject to a decision making process based upon constituent needs and interests,** S. 1547, as reported, exempts these utilities from F.C.C. regulation. Presently **cooperative utilities charge the lowest pole rates to CATV pole users. CATV industry representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily**

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<sup>1</sup> S. Rep. No. 95-580, at 15 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 123.

<sup>2</sup> Id.

<sup>3</sup> 1978 U.S.C.C.A.N. 109, 124-125, S. Rep. No. 95-580, at 16-17. At the time, only Connecticut regulated pole attachments.) 1978 U.S.C.C.A.N. 109, 122, S. Rep. at 14.

**high pole rental fees.** These rates presumably reflect what local authorities and managers of customer-owned cooperatives regard as equitable distribution of pole costs between utilities and cable television systems.”<sup>4</sup>

**“Cooperatively owned utilities, by and large, are located in rural areas where often over-the-air television service is poor. Thus the customers of these utilities have an added incentive to foster the growth of cable television in their areas. Many stockholders of power or electric cooperatives also subscribe to cable television systems.”**<sup>5</sup>

## CURRENT LANDSCAPE

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***CATV is no longer a fledgling industry.***

- CATV now boasts 92% of homes passed with high speed internet availability and 125.7 million homes with cable video service.<sup>6</sup>

***20 States and the District of Columbia now regulate pole attachments.***

***Congress has repeatedly decided not to change the exemption. Why?***

- Co-op & municipal attachment rates are cost-based and fairly negotiated.
- Claims that access is being denied or rates are excessive are grossly overstated. A handful of “outliers” does not justify subjecting nearly 3,000 entities to costly and unnecessary regulation.<sup>7</sup>
- The same incentives still exist to keep attachment rates as low as possible (while ensuring cost recovery): to encourage deployment of advanced services.
- Cooperative board members and municipal utility board members/city council members are still answerable to the consumers in their communities that elect them.
- Co-ops and municipals know that if even one entity in the state is perceived as having rates that are too high or being too slow to grant access, they run the risk of state CATV lobby seeking to expand regulation.<sup>8</sup>

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<sup>4</sup> Id. U.S.C.A.N.N. at 126 and S. Rep. at 18.

<sup>5</sup> Id.

<sup>6</sup> Statistics as reported on [www.NCTA.com](http://www.NCTA.com).

<sup>7</sup> See NRECA comments submitted in response to FCC Notice of Proposed Rulemaking regarding the Rules and Policies Governing Pole Attachments, WC Docket No. 07-245 (Filed April 22, 2009) and NRECA reply comments submitted in response to FCC Notice in the Matter of A National Broadband Plan for Our Future, WC Docket No. 09-51, at 5 (Filed July 21, 2009).

<sup>8</sup> Recent examples include: Arkansas, Georgia, North Carolina, Ohio, Tennessee, Texas and Virginia.

## REVOKING THE EXEMPTION WILL NOT RESOLVE THE REAL BARRIERS TO BROADBAND DEPLOYMENT

***Barrier #1 Low customer density –not high pole rates– hinders rural and remote area deployment.***

- Cooperatives average just 7 consumers per mile of distribution line.

***Barrier #2 Revenue is simply insufficient for many for-profit, wireline-based providers to make the business case to extend to rural and remote areas.***

- This issue is not unique to broadband deployment.
- Electric and telephone cooperatives are able to serve sparsely populated rural areas because they: (1) do not need to earn a profit, (2) have access to low-cost financing, and (3) are exempt from federal income tax.<sup>1</sup>

## WHAT IS NEEDED ARE REAL SOLUTIONS

***Solution #1 If a subsidy is needed to advance federal broadband policy, then a reformed Universal Service Fund is a more appropriate vehicle.***

- The FCC's High-Cost Program should be amended to support the provision of broadband in those areas that remain insufficiently profitable for commercial providers.<sup>2</sup>

***Solution #2 Make it possible for cooperatives and municipals that want to provide broadband services but cannot due to state prohibitions or restrictions law by preempting such states.***

- The FCC already has this authority:  
(a) In general. *No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. . .*

<sup>1</sup> The exemption is not automatic. Tax exempt cooperatives must satisfy the Internal Revenue Services' cooperation operation principles and annually demonstrate that at least 85 percent of income comes from serving members as required by Internal Revenue code section 501(c)(12). *See e.g., Puget Sound Plywood, Inc. v. Commissioner*, 44 T.C. 305 (1965) ("the core of economic cooperative theory: (1) subordination of capital, (2) democratic control, and (3) *operation at cost*.").

<sup>2</sup> *See* NRECA comments, In re A National Broadband Plan for Our Future, GN Docket No. 09-51 (filed June 9, 2009) at 9.

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), ***the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.***<sup>3</sup>

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<sup>3</sup> 47 U.S.C. § 253.

## **The Public Power Exemption From Federal Pole Attachment Regulations Should Be Retained**

**Issue:** The American Public Power Association (APPA) strongly supports the development of a National Broadband Plan. APPA cannot, however, support a recommendation to remove the current exemptions from federal pole attachment regulation for public power systems as part of such Plan. No such action is necessary or appropriate

**Background:** In 1978 Congress passed the Pole Attachment Act, which required the FCC to establish subsidized rates for pole attachments for the then nascent cable industry. Public power systems were exempted from this “because the pole attachment rate charged by municipally owned and cooperative utilities are already subject to a decision-making process based upon constituent needs and interests.” (Senate Report 95-580)

This exemption has continued in effect, through multiple telecom reform efforts because Congress has maintained that this process is appropriate and adequate. Public power attachment rates are determined at the local level and are subject to local accountability of the public, constituent owners of the utility. Also, climate, terrain, soil, wind, and other conditions vary widely across the United States, making local control critically important.

### **Public Power Attachment Practices Do Not Impede Broadband Deployment**

There is no evidence that public power attachment rates are unreasonable, or in any way have impeded the deployment of broadband.

- Cable and telecommunications providers have ready access to municipally-owned poles and have generally built out the majority of their service areas for their core services.
- Public power systems typically charge a single, uniform cost-based rate for all attaching entities, irrespective of the specific communications service, including broadband.
- Therefore a cable or telecom provider seeking to offer broadband services incurs no additional costs or obstacles.

### **Public Power Attachment Rates Are Reasonable**

APPA opposes the imposition of either the FCC cable or telecommunications formula on public power systems, as it would unnecessarily establish an artificially low rate that effectively requires electric rate payers of non-profit municipalities to subsidize the pole attachments of for-profit communications service providers. Pole attachment rates are best regulated at the local level as they are based upon local ordinances, taxes, and safety requirements of general applicability as well as the cost of the pole and its maintenance.

APPA opposes any recommendations or legislative efforts that would remove exemptions for public power entities from the federal pole attachment rate and would establish an artificially low rate to benefit for profit attaching entities at the expense of electric consumers.